



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IX

75 Hawthorne Street  
San Francisco, CA 94105-3901

APR 10 2006

CERTIFIED MAIL NO. 7004 1160 0004 3168 6104  
RETURN RECEIPT REQUESTED

IN REPLY: AIR-5  
REFER TO: Docket No. R9-06-03

William Garnett, Manager  
BR Hamakua, LLC, General Partner  
BR Landing, LLC, General Partner  
Hamakua Energy Partners, L.P.  
6000 Fairview Rd., Suite 600  
Charlotte, NC 28210

Re: Hamakua Energy Partners, L.P. Notice of Violation

Dear Mr. Sanders:

Enclosed is a copy of a Finding and Notice of Violation ("NOV") issued pursuant to Sections 113(a)(1) and 113(a)(3) of the Clean Air Act, 42 U.S.C. §§ 7401-7671q (the "Act"), notifying you that the United States Environmental Protection Agency ("EPA"), Region IX, finds that Hamakua Energy Partners, L.P., and its general partners, BR Hamakua, LLC and BR Landing, LLC (collectively "Hamakua"), have violated certain requirements of a Prevention of Significant Deterioration permit and the New Source Performance Standards ("NSPS") at their liquid fuel cogeneration power plant located at Hamakua Sugar Mill in Haina, Hawaii (the "Facility").

You should be aware that section 113(a)(3) of the Act authorizes EPA to issue an order requiring compliance with the requirements of the Act, issue an administrative penalty order, or commence a civil action seeking an injunction and/or a civil penalty. Furthermore, section 113(c) of the Act provides for criminal penalties in certain cases.

In addition, under section 306 of the Act, the regulations promulgated thereunder (40 CFR Part 32), and Executive Order 11738, facilities to be used in federal contracts, grants, and loans must be in full compliance with the Act and all regulations promulgated pursuant to it. Violation of the Act may result in the facility being declared ineligible for participation in any federal contract, grant, or loan.

If you wish to discuss the enclosed NOV, you may request a conference with EPA within ten (10) working days of receipt of this NOV. The conference will afford Hamakua an opportunity to present information bearing on the finding of violation, the nature of the violations, and any efforts it may have taken or proposes to take to achieve compliance.

If you have any questions pertaining to this NOV, please contact Charles Aldred of my office at (415) 972-3986, or have your attorney contact Ivan Lieben of the Office of Regional Counsel at (415) 972-3912.

Thank you for your cooperation in this matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'Deborah Jordan', with a stylized, flowing script.

Deborah Jordan  
Director, Air Division

Enclosure

cc: Wilfred Nagamine, Hawaii DOH  
Larry F. Kafchinski, Hamakua Energy Partners, L.P.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IX

75 Hawthorne Street  
San Francisco, CA 94105-3901

APR 10 2006

IN REPLY: AIR-5

REFER TO: Docket No. R9-06-03

Wilfred K. Nagamine  
Manager, Clean Air Branch  
Hawaii State Department of Health  
P.O. Box 3378  
Honolulu, HI 96801-9984

Re: Hamakua Energy Partners, L.P. Notice of Violation

Dear Mr. Nagamine:

Enclosed for your information is a copy of a Finding and Notice of Violation ("NOV") that the United States Environmental Protection Agency ("EPA") issued to Hamakua Energy Partners, L.P., and its general partners, BR Hamakua, LLC and BR Landing, LLC (collectively "Hamakua"), for violations at their liquid fuel cogeneration power plant located at Hamakua Sugar Mill in Haina, Hawaii (the "Facility").

The purpose of the NOV is to notify Hamakua that EPA finds that it has violated conditions in the Facility's Prevention of Significant Deterioration permit and the New Source Performance Standards requirements of the Clean Air Act ("Act"). The violations are set forth more specifically in the enclosed NOV. The NOV has been issued pursuant to Sections 113(a)(1) and 113(a)(3) of the Act, 42 U.S.C. §§ 7413(a)(1) and (a)(3).

If you have any questions concerning this NOV, please contact Charles Aldred of the Region 9 Air Division's Enforcement Office at (415) 972-3986.

Sincerely,



Deborah Jordan  
Director, Air Division

Enclosure

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION IX

In the Matter of:	)	
	)	Docket No. R9-06-03
Hamakua Energy Partners, L.P.	)	
Honokaa, Hawaii	)	
	)	FINDING AND NOTICE
Proceeding Under Section	)	OF VIOLATION
113(a), Clean Air Act,	)	
as Amended	)	
_____	)	

This Finding and Notice of Violation ("NOV") is issued to Hamakua Energy Partners, L.P., and its general partners, BR Landing, LLC and BR Hamakua, LLC (collectively "Hamakua"), for violations of the Clean Air Act ("CAA" or the "Act"), as amended, 42 U.S.C. §§ 7401-7671q, at their liquid fuel cogeneration power plant (the "Facility") located at Hamakua Sugar Mill, in Haina, Hawaii. This NOV is issued pursuant to Section 113(a)(1) of the Act, 42 U.S.C. § 7413(a)(1), which requires the Administrator of the United States Environmental Protection Agency ("EPA") to notify any person in violation of a state implementation plan ("SIP") or permit of the violations. EPA may also, at its discretion, provide notice to any person in violation of other CAA requirements pursuant to Section 113(a)(3) of the Act. The authority to issue this NOV has been delegated to the Regional Administrator of EPA, Region IX, and redelegated to the Director of the Air Division ("Director") of EPA, Region IX.

The Director hereby notifies you that the Facility has been and is in violation of conditions of its federally enforceable Prevent of Significant Deterioration ("PSD")/Covered Source Permit ("CSP") No. 0243-01-C, issued on June 8, 1998 and amended on September 5 and 28, 2000 (the "Permit"), including emissions limits for

nitrogen oxides ("NOx") and requirements to continuously monitor carbon monoxide ("CO") and opacity at the Facility. In addition, Hamakua has violated the Act by failing to comply with New Source Performance Standards ("NSPS") requirements requiring submission of excess emissions reports to EPA.

## **STATUTORY AND REGULATORY AUTHORITY**

### **National Ambient Air Quality Standards**

1. At times relevant to this NOV, the Administrator of EPA ("Administrator"), pursuant to authority under Section 109 of the Act, 42 U.S.C. § 7409, promulgated the National Ambient Air Quality Standards ("NAAQS") for certain criteria pollutants, including particulate matter ("PM10"), CO and NO<sub>2</sub>. See 40 C.F.R. §§ 50.7, 50.8 and 50.11.
2. Pursuant to Section 107(d) of the Act, 42 U.S.C. § 7407(d), the Administrator promulgated lists of attainment status designations for each air quality control region ("AQCR") in every state. These lists identify the attainment status of each AQCR for each of the criteria pollutants. The attainment status designations for the Hawaii AQCRs are listed at 40 C.F.R. § 81.312.
3. The Facility is located in Hawaii County, which has been designated as attainment/unclassifiable for the NAAQS for PM10, CO and NO<sub>2</sub>. 40 C.F.R. § 81.312.
4. For NAAQS regulatory purposes, including for permitting, NOx levels are used as a surrogate for NO<sub>2</sub> levels since NOx is either present as NO<sub>2</sub> or readily converts to NO<sub>2</sub> in the atmosphere and hence is a precursor to NO<sub>2</sub>.

### **State Implementation Plan**

5. Section 110 of the Act, 42 U.S.C. § 7410, requires each state to adopt and submit to EPA a plan which provides for the implementation, maintenance, and enforcement of primary and secondary National Ambient Air Quality Standards ("NAAQS") in the state. Upon approval by EPA, the plan becomes part of the SIP.
6. Section 110(a)(2)(C) of the Act, 42 U.S.C. § 7410(a)(2)(C), requires that each "applicable implementation plan" include a permit program. Part C requires the issuance of permits prior to the construction or operation of a new source or modification.
7. The Hawaii Department of Health ("HDOH") has the primary jurisdiction for crafting, implementing, and enforcing Hawaii SIP permit program requirements in Hawaii County.
8. Hawaiian Administration Rules ("HAR") §§ 11-60 *et seq.* were approved into and made a part of the federally enforceable Hawaii SIP pursuant to 42 U.S.C. § 7410 in August 1983.<sup>1</sup> 48 Fed. Reg. 37402.

### **Prevention of Significant Deterioration**

9. Section 110(a)(2)(C) of the Act, 42 U.S.C. § 7410(a)(2)(C), requires that each SIP include a PSD permit program as provided in Part C of Title I of the Act, 42 U.S.C. §§ 7470-7491.
10. On June 19, 1978, pursuant to Sections 160 through 169 of the Act, 42 U.S.C. §§ 7470-7479, EPA promulgated PSD regulations at 40 C.F.R. § 52.21. 43 Fed.

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<sup>1</sup> HDOH significantly updated these administrative permitting regulations in 2001. The new regulations which have not yet been approved into the SIP are located at § HAR 11-60.1 *et seq.*

Reg. 26,402 as amended at 45 Fed. Reg. 527411 (Aug. 7, 1980), 68 Fed. Reg. 11316, 11322 (Mar. 10, 2003), and 68 Fed. Reg. 74483, 74488 (Dec. 24, 2003).

The provisions of 40 C.F.R. §§ 52.21(b) through (w) were incorporated by reference and made part of the SIP for the State of Hawaii at 40 C.F.R. § 52.632, Significant Deterioration of Air Quality.

11. The PSD regulations define a "major stationary source" to include any stationary source which emits, or has the potential to emit ("PTE"), 100 tons per year ("tpy") of any air pollutant subject to regulation for 28 defined categories of stationary sources or 250 tpy of any air pollutant subject to regulation under the Act for all other sources. 40 C.F.R. § 52.21(b)(1)(i).
12. Under the PSD program, the construction of a new major stationary source requires the owner or operator to obtain a PSD permit that meets the requirements of Section 165 of the Act for all pollutants that have a significant PTE level. 40 CFR §§ 52.21(b)(2)(i) and 52.21(i)(2).
13. Among other pollutants, the PSD regulations define "significant" in reference to a new source's PTE level as a net emissions increase of or the potential of a source to emit 15 tpy of PM<sub>10</sub>, 100 tpy of CO and 40 tpy of NO<sub>x</sub>. 40 C.F.R. § 52.21(b)(23)(i).
14. In particular, the PSD permitting process requires, among other things, for pollutants emitted in significant amounts the application of BACT to control emissions, 40 C.F.R. § 52.21(j); air quality modeling by the source, 40 C.F.R. 52.21(l); and a detailed impact analysis regarding both the NAAQS and allowable increments, 40 C.F.R. 52.21(k).



15. EPA originally delegated the authority to implement and enforce the PSD program and its implementing regulations to HDOH on October 13, 1983, and amended the delegation on December 12, 1988. Under the delegation, HDOH has the primary responsibility of issuing federally enforceable PSD permits pursuant to 40 C.F.R. § 52.21.
16. After receipt of a PSD permit application and pursuant to 40 C.F.R. § 52.21 and HARS Chapter 11-60.1, HDOH issued Prevent of Significant Deterioration ("PSD")/Covered Source Permit ("CSP") No. 0243-01-C (the "Permit") to Hamakua for construction and operation of the Facility on June 8, 1998, with amendments on September 5 and 28, 2000. The Permit included PSD conditions for certain NAAQS pollutants with "significant" emissions, including PM<sub>10</sub>, CO and NO<sub>x</sub>.
17. Condition D.1.a.7) of the Permit requires:

Prior to the date of start-up and thereafter, Hamakua Energy Partners, L.P., shall at its own expense install, operate, and maintain the following continuous monitoring systems for each combustion turbine generator to measure and record the following parameters or data. The associated date and time of the monitored data shall also be recorded.

.....

NO<sub>x</sub>, CO, and CO<sub>2</sub> or O<sub>2</sub> concentrations in the stack gases using a CEMs system. If a CO<sub>2</sub> CEM is used, 40 CFR Part 60, Appendix A, Method 20, Equations 20-2 and 20-5 shall be utilized. The system shall meet U.S. EPA performance specifications (40 CFR Part 60 Section 60.13 and 40 CFR Part 60, Appendix B, and 40 CFR Part 60, Appendix F). The CEM shall be on-line and fully operational, upon completion and thereafter of the performance specification test. The emission rates for NO<sub>x</sub> and CO shall be recorded in ppmvd at 15 percent O<sub>2</sub> and lbs/hr . . . .



18. Condition D.1.a.8) of the Permit requires:

Prior to the date of start-up and thereafter, Hamakua Energy Partners, L.P., shall at its own expense install, operate, and maintain the following continuous monitoring systems for each combustion turbine generator to measure and record the following parameters or data. The associated date and time of the monitored data shall also be recorded.

....

Opacity levels of stack emissions using a transmissometer continuous monitoring system. The systems shall meet U.S. EPA monitoring performance standards (40 CFR Part 60 Section 60.13 and 40 CFR Part 60, Appendix B, Performance Specifications).

19. Condition C.1.e) of the Permit requires that, except for the combustion turbine generators' start-up, shut-down, or maintenance, the Facility shall not discharge or cause the discharge into the atmosphere from any combustion turbine NO<sub>x</sub> (as NO<sub>2</sub>) in excess of the following:
- a. 11.7 lbs/hr for Combined Cycle mode;
  - b. 33.4 lbs/hr for Simple Cycle mode;
  - c. 15 ppmvd @ 15 percent O<sub>2</sub> for Combined Cycle mode; or
  - d. 42 ppmvd @ 15 percent O<sub>2</sub> for Combined Cycle mode.

20. Failure to comply with the PSD regulations or any condition in a permit issued pursuant to such regulations, including any PSD permit issued by a delegate agency such as HDOH, subjects the source to enforcement under Section 113 of the Act. 40 C.F.R. § 52.23.

#### **New Source Performance Standards**

25. Pursuant to Section 111 of the Act, 42 U.S.C. § 7411, the Administrator of the EPA promulgated the NSPS General Provisions, 40 C.F.R. Part 60 Subpart A, on

December 23, 1971, 36 Fed. Reg. 24877, as amended, and the NSPS Standards of Performance for Stationary Gas Turbines, 40 C.F.R. Part 60 Subpart GG, on September 10, 1979, 44 Fed. Reg. 52798, as amended.

26. The Facility is an affected facility subject to 40 C.F.R. Part 60 Subpart A. 40 C.F.R. § 60.2 states that “[a]ffected facility means, with reference to a stationary source, any apparatus to which a standard is applicable.” 40 C.F.R. § 60.1 states that “the provisions of this part apply to the owner or operator of any stationary source which contains an affected facility, the construction or modification of which is commenced after the date of publication in this part of any standard (or if earlier, the date of publication of any proposed standard) applicable to that facility.”
27. 40 C.F.R. § 60.330 Section (a) states that “[t]he provisions of this subpart are applicable to the following affected facilities: All stationary gas turbines with a heat input at peak load equal to or greater than 10.7 gigajoules (10 million Btu) per hour, based on the lower heating value of the fuel fired.” 40 C.F.R. § 60.330 Section (b) states that “[a]ny facility under paragraph (a) of this section which commences construction, modification, or reconstruction after October 3, 1977, is subject to the requirements of this part . . . .”
28. 40 C.F.R. § 60.334 specifies the type of compliance monitoring required under NSPS Subpart GG.
29. 40 C.F.R. § 60.334 Section (j) states that “[f]or each affected unit required to continuously monitor parameters or emissions, or to periodically determine the fuel sulfur content or fuel nitrogen content under this subpart, the owner or

- operator shall submit reports of excess emissions and monitor downtime, in accordance with § 60.7(c). Excess emissions shall be reported for all periods of unit operation, including startup, shutdown and malfunction.”
30. 40 C.F.R. 60.334 Section (j)(5) states that “[a]ll reports required under 60.7(c) shall be postmarked by the 30th day following the end of each calendar quarter.”
31. 40 C.F.R. § 60.13(e) requires that, “[e]xcept for system breakdowns, repairs, calibration checks, and zero and span adjustments required under paragraph (d) of this section, all continuous monitoring systems shall be in continuous operation and shall meet minimum frequency operation requirements . . . .”
32. Pursuant to Section 111(e) of the Act, 42 U.S.C. § 7411(e), after the effective date of standards of performance promulgated under section 111 of the Act, it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source.

#### **FINDINGS OF FACTS**

33. Hamakua is the owner and operator of the Facility located at the Hamakua Sugar Mill in Haina, Hawaii.
34. In addition to other components, the Facility contains two 23 megawatt combustion turbine generators, Units CT-1 and CT-2.
35. Hamakua owned and operated the Facility during all times relevant to this NOV.
36. At all times pertinent to this NOV, Hamakua was a "person" as that term is defined in Section 302(e) of the Act, 42 U.S.C. § 7602(e).
37. The Facility, which was constructed in 1999, is a "major stationary source" under the PSD program with "significant" emissions for CO, PM10 and NOx, among

other pollutants. As such, the Facility underwent PSD permitting for CO, PM10 and NOx, among other pollutants.

38. Hamakua submits to HDOH quarterly Excess Emissions and Data Assessment Reports ("HDOH Reports") for the Facility, which report, among other things, time periods when the CEMS for CO and opacity at the Facility were not operational, as well as periods of NOx emissions in excess of the maximum emission limit.

#### Continuous Monitoring

39. For Unit CT-1, the HDOH Reports for the following quarters indicated the following total hours of malfunction, excluding downtime for quality assurance and calibration, of the CO CEMS:
- a. 28 hours in the second quarter of 2001;
  - b. 26 hours in the third quarter of 2001;
  - c. 27 hours in the fourth quarter of 2001;
  - d. 25 hours in the first quarter of 2002;
  - e. 26 hours in the second quarter of 2002;
  - f. 9 hours in the third quarter of 2002;
  - g. 21 hours in the fourth quarter of 2002;
  - h. 20 hours in the first quarter of 2003;
  - i. 1 hour in the second quarter of 2003;
  - j. 11 hours in the third quarter of 2003;
  - k. 3 hours in the fourth quarter of 2003
  - l. 18 hours in the first quarter of 2004;
  - m. 4 hours in the second quarter of 2004;
  - n. 6 hours in the third quarter of 2004;
  - o. 228 hours in the fourth quarter of 2004;
  - p. 16 hours in the first quarter of 2005;
  - q. 14 hours in the second quarter of 2005; and
  - r. 20 hours in the third quarter of 2005.
40. For Unit CT-2, the HDOH Reports for the following quarters indicated the following total hours of malfunction, excluding downtime for quality assurance and calibration, of the CO CEMS:

- a. 8.50 hours in the second quarter of 2001;
- b. 18 hours in the third quarter of 2001;
- c. 35 hours in the fourth quarter of 2001;
- d. 28 hours in the first quarter of 2002;
- e. 157 hours in the second quarter of 2002;
- f. 42 hours in the fourth quarter of 2002;
- g. 3 hours in the first quarter of 2003;
- h. 2 hours in the third quarter of 2003;
- i. 3 hours in the first quarter of 2004;
- j. 1 hour in the second quarter of 2004;
- k. 5 hours in the fourth quarter of 2004;
- l. 5 hours in the first quarter of 2005;
- m. 2 hours in the second quarter of 2005; and
- n. 22 hours in the third quarter of 2005.

41. For Unit CT-1, the HDOH Reports for the following quarters indicated the following total hours of malfunction, excluding downtime for quality assurance and calibration, of the opacity transmissometer continuous monitoring system:

- a. 10.53 hours for the second quarter of 2001;
- b. 23.30 hours for the third quarter of 2001;
- c. 51.51 hours for the fourth quarter of 2001;
- d. 38.39 hours for the first quarter of 2002;
- e. 12 hours for the second quarter of 2002;
- f. 15.42 hours for the third quarter of 2002;
- g. 18.20 hours for the fourth quarter of 2002;
- h. 22.21 hours for the first quarter of 2003;
- i. 2.24 hours for the second quarter of 2003;
- j. 23.39 hours for the third quarter of 2003;
- k. 3.53 hours in the fourth quarter of 2003
- l. 18.05 hours in the first quarter of 2004;
- m. 2.23 hours in the second quarter of 2004;
- n. 6.27 hours in the third quarter of 2004;
- o. 1.68 hours for the fourth quarter of 2004;
- p. 5.85 hours for the first quarter of 2005;
- q. 5.78 hours for the second quarter of 2005; and
- r. 21.57 hours for the third quarter of 2005.

42. For Unit CT-2, the HDOH Reports for the following quarters indicated the following total hours of malfunction, excluding downtime for quality assurance and calibration, of the opacity transmissometer continuous monitoring system:

- a. 37.28 hours for the second quarter of 2001;
- b. 64.46 hours for the third quarter of 2001;
- c. 41.80 hours for the fourth quarter of 2001;
- d. 49.82 hours for the first quarter of 2002;
- e. 38.22 hours for the second quarter of 2002;
- f. 19.90 hours for the fourth quarter of 2002;
- g. 5.19 hours for the first quarter of 2003;
- h. 40.50 hours for the second quarter of 2003;
- i. 7.23 hours for the third quarter of 2003;
- j. 89.37 hours in the first quarter of 2004;
- k. 40.50 hours in the second quarter of 2004;
- l. 7.23 hours in the third quarter of 2004;
- m. 158.32 hours for the fourth quarter of 2004;
- n. 99.78 hours for the first quarter of 2005;
- o. 39.67 hours for the second quarter of 2005; and
- p. 73.91 hours for the third quarter of 2005.

#### Excess NOx Emissions

43. For Unit CT-1, the HDOH Reports for the following quarters indicated the following total hours of NOx emissions in excess of the allowable maximum emissions limit of 15 ppmvd @ 15% O<sub>2</sub>, excluding periods of start-up, shut-down, or maintenance:
- a. 20 hours for the second quarter of 2001;
  - b. 16 hours for the third quarter of 2001;
  - c. 19 hours for the fourth quarter of 2001;
  - d. 15 hours for the first quarter of 2002;
  - e. 11 hours for the second quarter of 2002;
  - f. 12 hours for the third quarter of 2002;
  - g. 20 hours for the fourth quarter of 2002;
  - h. 27 hours for the first quarter of 2003;
  - i. 3 hours for the second quarter of 2003;
  - j. 5 hours for the third quarter of 2003; and
  - k. 3 hours for the fourth quarter of 2003.
44. For Unit CT-2, the HDOH Reports for the following quarters indicated the following total hours of NOx emissions in excess of the allowable maximum emissions limit of 15 ppmvd @ 15% O<sub>2</sub>, excluding periods of start-up, shut-down, or maintenance:

- a. 1 hour for the second quarter of 2002; and
  - b. 1 hour for the first quarter of 2003.
45. For Unit CT-1, the HDOH Reports for the following quarters indicated the following total hours of NO<sub>x</sub> emissions in excess of the allowable maximum emissions limit of 11.7 lbs/hr, excluding periods of start-up, shut-down, or maintenance:
- a. 5 hours for the second quarter of 2001;
  - b. 12 hours for the third quarter of 2001;
  - c. 3 hours for the fourth quarter of 2001;
  - d. 15 hours for the first quarter of 2002;
  - e. 24 hours for the second quarter of 2002;
  - f. 47 hours for the third quarter of 2002;
  - g. 51 hours for the fourth quarter of 2002;
  - h. 11 hours for the first quarter of 2003; and
  - i. 4 hours for the second quarter of 2003.
46. For Unit CT-2, the HDOH Reports for the following quarters indicated the following total hours of NO<sub>x</sub> emissions in excess of the allowable maximum emissions limit of 11.7 lbs/hr, excluding periods of start-up, shut-down, or maintenance:
- a. 1 hour for the first quarter of 2005;

**Failure to Submit NSPS Excess Emission Reports**

47. The Facility is also an "affected facility" subject to 40 C.F.R. Part 60 Subpart GG, because it contains a stationary gas turbine with a heat input peak load equal or greater to 10.7 gigajoules (10 million Btu) per hour, based on the lower heating value of the fuel fired.
48. Since the Facility is an "affected facility" it is required to continuously monitor emissions pursuant to 40 C.F.R. § 60.334.



49. Despite being subject to NSPS reporting requirements in 40 C.F.R. § 60.7(c) and §§ 60.334 (j) and (j)(5), Hamakua has failed to submit any NSPS quarterly reports to EPA, Region IX, since initial construction and operation.

#### **FINDING OF FAILURE TO COMPLY**

50. The periods of malfunction identified in Paragraphs 39 and 40 constitute ongoing violations of a condition of a federally enforceable PSD permit, namely Condition D.1.a.8) of the Permit, requiring continuous monitoring consistent with 40 C.F.R. § 60.13(e) for CO emissions from Units CT-1 and CT-2 through the use of a CEMS.
51. The periods of malfunction identified in Paragraphs 41 and 42 constitute ongoing violations of a condition of a federally enforceable PSD permit, namely Condition D.1.a.7) of the Permit, requiring continuous monitoring consistent with 40 C.F.R. § 60.13(e) of opacity of the emissions from Units CT-1 and CT-2 through the use of a transmissometer continuous monitoring system.
52. The periods of excess NO<sub>x</sub> emissions identified in Paragraphs 43 through 46 constitute ongoing violations of a condition of a federally enforceable PSD permit, namely Condition C.1.e) of the Permit, setting maximum NO<sub>x</sub> emissions limits for Units CT-1 and CT-2.
53. The failure to submit NSPS quarterly reports to EPA, Region IX, constitutes an ongoing violation of 40 C.F.R. §§ 60.7(c) and 60.334(j).

#### **NOTICE OF VIOLATION**

Notice is given to Hamakua that the Administrator of the EPA, by authority duly delegated to the undersigned, finds that Hamakua is in violation of the applicable SIP for

Hawaii, provisions of a federal PSD permit and federal regulations, as set forth in the Finding of Failure to Comply, above. EPA reserves the right to amend this NOV or issue a new NOV based on additional information obtained through Section 114 of the Act, 42 U.S.C. § 7414, or any other source available to the Government at any point.

### **ENFORCEMENT**

Section 113(a)(1) of the Act provides that at any time after the expiration of 30 days following the date of the issuance of this NOV, the Administrator may, without regard to the period of violation, issue an order requiring compliance with the requirements of the SIP, issue an administrative penalty order, or bring a civil action pursuant to Section 113(b) for injunctive relief and/or civil penalties of not more than \$25,000 per day for each violation that occurs on or before January 30, 1997, not more than \$27,500 per day for each violation that occurs after January 30, 1997, and not more than \$32,500 per day for each violation that occurs after March 15, 2004. 40 C.F.R. Part 19.

Furthermore, if any person knowingly violates any federal regulation or permit requirement more than 30 days after the date of issuance of this NOV, Section 113(c) of the Act provides for criminal penalties, imprisonment or both.

Under Section 306 of the Act, 42 U.S.C. § 7606, the regulations promulgated thereunder (40 C.F.R. Part 32), and Executive Order 11738, facilities to be utilized in federal contracts, grants and loans must be in full compliance with the Act and all regulations promulgated pursuant to it. Violations of the Act may result in the facility being declared ineligible for participation in any federal contract, grant or loan.

### **PENALTY ASSESSMENT CRITERIA**

Section 113(e)(1) of the Act states that the Administrator or the court shall determine the amount of a penalty to be assessed by taking into consideration such factors as justice may require, including the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence (including evidence other than the applicable test method), payment by the violator of penalties previously assessed for the same violations, the economic benefit of noncompliance, and the seriousness of the violation.

Section 113(e)(2) of the Act allows the court to assess a penalty for each day of violation. For purposes of determining the number of days of violation, where EPA makes a prima facie showing that the conduct or events giving rise to this violation are likely to have continued or recurred past the date of the NOV, the days of violation shall be presumed to include the date of the NOV and each and every day thereafter until Hamakua establishes that continuous compliance has been achieved, except to the extent that Hamakua can prove by the preponderance of the evidence that there were intervening days during which no violation occurred or that the violation was not continuing in nature.

### OPPORTUNITY FOR CONFERENCE

Hamakua may, upon request, confer with EPA. The conference will enable Hamakua to present evidence bearing on the finding of violation, on the nature of violation, and on any efforts it may have taken or proposals to take to achieve compliance. If such conference is held, Hamakua may be represented by counsel. EPA also intends to invite representatives from the Hawaii Department of Health to any such conference. A request for a conference must be made within 10 working days of receipt of this NOV, and the request for a conference or other inquiries concerning the NOV should be made in writing to:

Ivan Lieben  
Office of Regional Counsel  
U.S. EPA (ORC-3)  
75 Hawthorne Street  
San Francisco, CA 94105  
(415) 972-3914

Dated: 4/10/06

  
Deborah Jordan  
Director, Air Division